Central States, Southeast and Southwest Areas Pension Fund d/b/a Three Hundred South Grand Company *and* Mary E. Tesson

Local No. 2, International Union of Operating Engineers, AFL-CIO *and* Mary E. Tesson. Cases 14-CA-13933 and 14-CB-4985

September 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 9, 1980, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, Respondent Union filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge only to the extent consistent herewith.[2]

The Employer manages an office building located at 300 South Grand Boulevard in St. Louis, Missouri. The Union represents clerical employees and stationary engineers employed at this location. Carl B. Pratt, the building manager and chief engineer, is also president of the Union and chairman of its executive board. Mary Tesson, the Charging Party, is Pratt's secretary and also acts as bookkeeper for the Employer.

On September 5, 1979, Tesson began working for the Employer at an hourly wage of $5. At the time Pratt hired Tesson, he notified her that she would receive that wage rate for the first 30 days of her employment, and thereafter would receive the contractual wage rate of $7.18 per hour. The collective-bargaining agreement does not provide for a lower than contractual starting wage rate for Tesson's classification or any other classification.[3]

Shortly after Tesson began working, Donald Goebel, the Union's assistant business manager--financial secretary, learned from Pratt that Tesson was receiving a wage rate of $5 per hour. When Goebel objected to her being paid at a wage rate lower than that provided in the contract, Pratt claimed that Tesson's job was complex and required considerable training. Thereafter, Goebel withdrew his objection,[4] and he did not thereafter discuss the matter with Tesson. Tesson joined the Union on October 9, 1979, and from that date on she received wages in accordance with the contract.

On April 7, 1980,[5] Pratt hired his son, James, as a maintenance helper. Tesson, as part of her duties as bookkeeper, was instructed to pay James Pratt the contractual wage rate for his classification. Tesson thereby learned for the first time that it was not the Employer's general practice to pay new employees less than the contractual wage rate.

James Pratt was initiated into the Union on May 13. On May 14, the employees met to elect a new steward to replace Fred Simshauser,[6] who had found other employment. Present were Carl Pratt, Tesson, Simshauser, employee William Kavanagh, and three other employees. Pratt voted in the election, and Kavanagh was elected steward. Once the votes had been counted, Tesson informed Kavanagh that she wanted to file a grievance over the Employer's failure to pay her the contractual wage rate during her first 30 days of employment. Tesson pointed out that James Pratt had received the contractual wage rate from the beginning of his employment, and stated that she believed she had been discriminated against.

Kavanagh said to Pratt, "Carl, she's got you because you've never done this before in the past, she's got a good grievance, and I think she is going to win it." Pratt responded that the Union's executive board (on which Pratt and Simshauser served) would probably reject her claim. Tesson stated that she would take her grievance to arbitration, and Pratt informed her that when she lost she would have to pay court costs and attorney's fees for herself and the Union.[7]

Simshauser instructed Tesson to reduce her grievance to writing, which she did later that day.

[1] No exceptions were filed by Respondent Employer. In adopting the Administrative Law Judge's conclusion that the Employer violated Sec. 8(a)(2) and (1) of the Act, we find that Carl Pratt was a high-level supervisor and note that he voted in an intraunion election for steward. See *Nassau and Suffolk Contractors' Association, Inc., etc.*, 118 NLRB 174 (1957); *Anchorage Businessmen's Association, etc.*, 124 NLRB 662, 669 (1959).

[2] We shall in our Order include provisions requiring Respondents to make whole, rather than reimburse, Tesson. We also shall conform the language of the Order and notice to more closely reflect the violations found.

[3] Tesson's predecessor worked as secretary/bookkeeper for several months before the parties agreed to include the position in the bargaining unit under a new contract. At the time of the parties' agreement to include Tesson's predecessor, she received a raise to the newly established contractual wage rate.

[4] Goebel testified that he feared that the Employer would seek to remove Tesson's position from the bargaining unit as a "confidential" employee if he protested Tesson's wage rate. His testimony does not establish that Pratt or any other management official suggested that the Employer was considering such action.

[5] Except as otherwise indicated, all dates hereafter are in 1980.

[6] Although Simshauser ceased to be the steward at the Employer's building, he retained other offices in the Union as trustee and member of the executive board.

[7] The contract contains no provision for arbitration of grievances.

She gave her grievance to Kavanagh, who discussed it with Goebel. Goebel agreed that the grievance had merit and instructed Kavanagh to obtain a management response. On Kavanagh's instructions, Tesson placed a copy of the grievance on Pratt's desk. Later that day, while dictating correspondence to Tesson, Pratt commented that he believed the grievance was a "mistake" and instructed her to forward it to Donald Weyerich, the Employer's attorney and agent. Pratt also jokingly requested that Tesson ask Weyerich to begin advertising for a new secretary. Pratt, acting in his capacity as a supervisor, denied the grievance on May 19.

Thereafter, Weyerich and Goebel discussed the grievance, but failed to reach agreement on its disposition. Weyerich claimed that Tesson was in training during her first 30 days, while Goebel maintained that the lower wage rate was in violation of the contract. Goebel also requested a written response to the grievance, which Weyerich stated was not required by the contract. Goebel then spoke with Herman Jones, the Union's business manager. Jones suggested that the Employer's argument that Tesson's first 30 days were probationary might be justified. Goebel finally telephoned the Union's attorney, Barry Levine. Levine told Goebel that the grievance was untimely because of Tesson's delay in filing it.[8] Goebel then spoke with Jones, who suggested that Goebel follow Levine's advice.

On May 20, Goebel informed Tesson that the Union had decided not to represent her further on the grievance because it had concluded that the grievance was untimely. In response to Tesson's inquiry, Goebel advised her that she could appeal the decision to the Union's executive board.

The same day, Pratt discussed Tesson's grievance with her and claimed that the Union had no jurisdiction over the first 30 days of work. Pratt informed Tesson that she could appeal the Union's decision to the executive board, and that he probably would not vote if she did so. (As noted previously, Pratt chaired the executive board.) Pratt also suggested that Tesson discuss the grievance with other officials of the Employer later that week, with Goebel present as her representative. Tesson did not accept this invitation.

By letter dated May 20, Goebel informed Tesson that her grievance had been received but that it had no merit "since [it] . . . is not timely." On May 21, Tesson wrote Jones, advised him of her intention to appeal to the executive board, and requested that Kavanagh attend on her behalf. By letter dated May 23, Jones informed Tesson that her appeal would be heard on June 24 and that Kavanagh would be advised of the meeting.

On June 17, Tesson filed the instant charges. Thereafter, on June 24, Tesson, with Kavanagh's assistance, appeared before the executive board.[9] Tesson testified that, before the executive board, Kavanagh declined to comment on her claim that Pratt's dual role as supervisor and union president created a conflict of interest which caused the Union to reject her grievance. Tesson also testified that Kavanagh "said he didn't want to say anything because he was receiving harassment at work already and he didn't want to make any more comments to make it any harder than it already was." Tesson further testified that, when one of the members of the executive board attempted to reassure Kavanagh that he would not be harassed, Kavanagh responded to him, "That is easy for you to say, you don't have to work there." Tesson also testified that, after further assurances were made, Kavanagh commented on the wage scale. Kavanagh testified that he told the executive board that he thought Tesson "had a grievance" and that she was the only employee who was subjected to "classification discrimination." Kavanagh did not deny Tesson's testimony that he initially expressed reluctance to comment on the merits of her grievance.

Following Tesson's and Kavanagh's presentation, the executive board voted to deny the appeal.[10] By letter dated July 1, Jones informed Tesson that the executive board had denied her appeal because it "is without merit."

The Administrative Law Judge found that the Union violated Section 8(b)(1)(A) of the Act by breaching its duty of fair representation in two respects. He found that Goebel, by failing to advise Tesson of his discussion with Pratt concerning her wages shortly after her hire, prevented her from learning at that time that she might have grounds to file a grievance over the matter. He further found that the executive board's adverse vote on her later-filed grievance flowed directly from Goebel's "arbitrary" failure to advise Tesson of her rights in a timely fashion, and that the refusal to further process her grievance therefore was merely perfunctory.

[8] The contractual grievance procedure contains no time limits, and Weyerich did not raise the issue of timeliness in his discussions with Goebel.

[9] Pratt was not in the room during the presentation of Tesson's grievance to the executive board.

[10] Pratt and Goebel did not vote on the appeal, nor, apparently, did Pratt participate in the discussion of the appeal before the vote. The record does not disclose whether Goebel participated in the discussion before the executive board vote. However, Simshauser, who was present on May 14 when Pratt first informed Tesson that the executive board probably would reject her grievance, voted as a member of the executive board.

We conclude that Respondent Union violated Section 8(b)(1)(A) of the Act by failing fairly to represent Tesson, but only for the following reasons.

A union's duty of fair representation requires it to serve the interests of all the employees it represents fairly and in good faith and without hostile discrimination based on unfair, arbitrary, irrelevant, or invidious distinctions.[11] In the performance of this duty, however, the effective administration of a contract requires that a union be afforded broad discretion in deciding what grievances to pursue and the manner in which they should be handled.[12] Mere negligence or poor judgment is insufficient to establish a breach of the duty of fair representation.[13]

Applying the above principles to the instant case, we conclude that the Union did not afford Tesson the fair consideration of her grievance to which she was entitled. In so doing, we find that Pratt's dual role as supervisor and high-ranking union official inherently tainted the Union's processing of the grievance. Thus, Tesson's initial hire at less than the contractual wage rate was Pratt's action, done in his capacity as a supervisor for the Employer, and it was he who, as the Employer's representative, denied the grievance at the initial step. At the same time, as president of the Union, Pratt was in a position to affect the Union's consideration of the merits of Tesson's grievance concerning her starting wage. Thus, at the union meeting on May 14, Pratt predicted that Tesson's grievance would fail and indicated his hostility toward Tesson's filing of the grievance by stating that, if she took her grievance to arbitration, she would have to pay attorney's fees for herself and the Union. The permeating effect of Pratt's dual roles is clear. Pratt's comments were made at a union meeting which Pratt attended as a union official, in the presence of Simshauser, who later voted as a member of the Union's executive board when it considered Tesson's grievance, as well as Kavanagh, the steward who was responsible for processing Tesson's grievance. Further, Pratt was Kavanagh's immediate supervisor during the entire time when Kavanagh was engaged in representing Tesson on her grievance, and Tesson's account of the June 24 executive board meeting makes it evident that Kavanagh's efforts in supporting her position before the executive board were hampered by his perception that he was being harassed at work by Pratt. Although Kavanagh on May 14 had indicated to Pratt that he felt that the grievance had merit, by June 24 he was reluctant to comment at all on the grievance despite the executive board's assurances.

Thus, although the Union attempted to maintain an appearance of fairness at its executive board meeting through Pratt's and Goebel's nonparticipation in the actual vote on Tesson's appeal, Pratt's involvement in earlier stages of the grievance and his continuing opportunity, as the Employer's building manager and chief engineer and the union president and chairman of the executive board, to influence other union participants in the grievance process subverted Tesson's right to a fair and impartial processing of her grievance. Moreover, the Union relied on the alleged untimeliness of the grievance despite the absence of a contractual time limit and the fact that the Employer had not raised the issue of timeliness. In these circumstances, we conclude that the Union processed Tesson's grievance in bad faith and thereby breached its duty of fair representation with respect to Tesson in violation of Section 8(b)(1)(A) of the Act.[14]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Central States, Southeast and Southwest Areas Pension Fund d/b/a Three Hundred South Grand Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Permitting its supervisor, Carl B. Pratt, to engage in the handling of grievances of its employees who are represented by Local No. 2, International Union of Operating Engineers, AFL-CIO, or in any other phase of the collective-bargaining process, at a time when he is an officer, agent, or representative of the Union, or otherwise interfering with the administration of the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

[11] *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, Local No. 106 (Owens-Illinois, Inc.)*, 240 NLRB 324 (1979).

[12] *Vaca* v. *Sipes, supra* at 191-192; *Ford Motor Company* v. *Huffman*, 345 U.S. 330, 338 (1953); *Truckdrivers, Oil Drivers and Filling Station and Platform Workers Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Transport, Inc.)*, 209 NLRB 292 (1974).

[13] *Local Union No. 195, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Stone & Webster Engineering Corporation)*, 240 NLRB 504, 508 (1979).

[14] In view of our conclusion that the Union breached its duty of fair representation in the manner in which it processed Tesson's grievance, we find it unnecessary to consider whether Goebel's failure in 1979 to inform Tesson that she might have grounds for a grievance also constituted a breach of the Union's duty of fair representation.

(a) Jointly and severally with Local No. 2, International Union of Operating Engineers, AFL-CIO, make whole Mary E. Tesson for any loss of earnings she may have suffered due to the Employer's failure to pay her the contractual wage rate in effect for her job classification during the first 30 days of her employment, by paying her a sum equal to the difference between the contractual wage rate and the hourly rate which she actually received during that time, plus interest, in accordance with the formula described in the section of the Administrative Law Judge's Decision entitled "The Remedy."[15]

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility at 300 South Grand Boulevard, St. Louis, Missouri, copies of the attached notice marked "Appendix A."[16] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by an authorized representative of the Employer, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to insure that said notices are not altered, defaced, or covered by any other material.

(d) Transmit to the Regional Director for Region 14 signed copies of said notice in sufficient numbers to be posted by Local No. 2, International Union of Operating Engineers, AFL-CIO, in all places where notices to its members and other employees in the bargaining unit are customarily posted.

(e) Post at the same places and under the same conditions as set forth in paragraph A, 2, (c), above, immediately upon receipt thereof, copies of the attached notice marked "Appendix B."

(f) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps the Respondent Employer has taken to comply herewith.

B. Respondent Local No. 2, International Union of Operating Engineers, AFL-CIO, St. Louis, Missouri, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing or refusing to fairly represent employees by failing to process grievances in a fair and impartial manner.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Jointly and severally with Central States, Southeast and Southwest Areas Pension Fund d/b/a Three Hundred South Grand Company make whole Mary E. Tesson for any loss of earnings she may have suffered due to the Union's failure to process in a fair and impartial manner her grievance over the Employer's failure to pay her the contractual wage rate in effect for her job classification during the first 30 days of her employment, by paying her a sum equal to the difference between the contractual wage rate and the hourly rate which she actually received during that period, plus interest, in accordance with the formula described in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(b) Post at its offices and meeting places copies of the attached notice marked "Appendix B."[17] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by an authorized representative of the Union, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members and other employees in the bargaining unit are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(c) Transmit to the Regional Director for Region 14 signed copies of said notice in sufficient numbers to be posted by Central States, Southeast and Southwest Areas Pension Fund d/b/a Three Hundred South Grand Company, in all places where notices to employees are customarily posted.

(d) Post at the same places and under the same conditions as set forth in paragraph B, 2, (b), above, immediately upon receipt thereof, copies of the attached notice marked "Appendix A."

(e) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

[15] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1950), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[16] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[17] See fn. 16, *supra*.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT permit our supervisor, Carl B. Pratt, to engage in the handling of any grievances of our employees who are represented by Local No. 2, International Union of Operating Engineers, AFL-CIO, or in any other phase of the collective-bargaining process, at a time when he also holds a position as an officer, agent, or representative of the Union, or otherwise interfere with the administration of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, jointly and severally with Local No. 2, International Union of Operating Engineers, AFL-CIO, make whole Mary E. Tesson for any loss of earnings she may have suffered as a result of our failure to pay her the wage rate set forth in the collective-bargaining agreement by paying to her the difference between her wage rate as set forth in the collective-bargaining agreement in effect during her first 30 days of employment and the wages she actually received, plus interest.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND D/B/A THREE HUNDRED SOUTH GRAND COMPANY

APPENDIX B

NOTICE TO
EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT fail or refuse to fairly represent employees by failing to process employee grievances in a fair and impartial manner.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights set forth above.

WE WILL, jointly and severally with Central States, Southeast and Southwest Areas Pension Fund d/b/a Three Hundred South Grand Company, make whole Mary E. Tesson for any loss of earnings she may have suffered as a result of our failure to process, in a fair and impartial manner, her grievance over her wages by paying to her the difference between her wage rate as set forth in the collective-bargaining agreement in effect during her first 30 days of employment and the wages she actually received, plus interest.

LOCAL NO. 2, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge:[1] These consolidated cases, Central States Southeast and South-

[1] The official transcript is hereby corrected to substitute the designation "Judge Zankel" in place of "Judge Saunders," wherever the latter identification appears.

west areas Pension Fund d/b/a Three Hundred South Grand Company (herein called the Employer) and Local No. 2, International Union of Operating Engineers, AFL-CIO (herein called the Union), were heard before me on July 31, 1980, in St. Louis, Missouri.

Upon charges filed by Mary E. Tesson, an individual, the Regional Director for Region 14 of the National Labor Relations Board (herein called the Board) issued a complaint against the Union on June 19, 1980. The complaint was amended on July 17. On July 3, 1980, the Regional Director issued a complaint against the Employer. By an order dated July 17, 1980, the above complaints were consolidated.

It is alleged that the Employer dominated[2] and rendered unlawful assistance to the Union in violation of Section 8(a)(2) and (1) of the National Labor Relations Act, as amended (herein called the Act). The basis of such allegation is that the Employer permitted its supervisor, Carl B. Pratt, to serve as the Union's president at a time when he participated in grievance handling and negotiating or administering collective-bargaining agreements.

The Union is alleged to have violated Section 8(b)(1)(A) of the Act by having failed or refused to process a wage grievance filed by Tesson.

Timely answers to the complaint were filed. The answers admitted certain matters but denied the substantive allegations and that either the Employer or the Union committed any unfair labor practices. All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and to meet material evidence, to examine and cross-examine witnesses, to present oral arguments, and to file briefs. I have carefully considered the contents of the briefs filed by counsel for all parties.

Upon consideration of the entire record, the briefs, and my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

No issue is raised as to jurisdiction or labor organization status. Based on the complaint allegations, the relevant admissions of the Union and the Employer, and on their jurisdictional stipulations, I find the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*[3]

There is substantially no dispute concerning the operative and relevant facts. The instant cases evolve from, and relate to, Tesson's effort to process a wage rate grievance.

The relevant Employer personnel are Douglas C. Fernau, vice president; Donald J. Weyerich, attorney and agent; and Carl B. Pratt.[4]

Relevant union officials are: Pratt, president and executive board member; Herman Jones, business manager; Donald Goebel, assistant business manager-financial secretary; William Kavanagh, steward; and Fred Simshauser, former steward, trustee, and executive board member.

On September 3, 1979, Pratt engaged Tesson in a preemployment interview. The job under consideration was secretary/bookkeeper. Pratt discussed Tesson's duties, responsibilities, and working conditions. He read certain portions of the Employer's collective-bargaining agreement with the Union. Specifically, he read items relating to pension, sick, and holiday benefits. Pratt did not, however, deliver a copy of the agreement to Tesson.

Pratt told Tesson she would be paid $5 per hour during her first 30 days of employment. He told her that, when she was initiated into the Union, she would be paid the union wage rate of $7.18 per hour. Pratt did not explicitly speak of the first 30 days of employment as a probationary period. Tesson agreed to the terms. September 5, 1979, was established as Tesson's reporting date.

The secretary/bookkeeper job became available when its incumbent, Barbara Benefield, resigned. When she worked for the Employer, she was Pratt's personal secretary.[5] Tesson reported on September 5. Benefield worked with her for 8 working days, until September 14. During this time, Benefield familiarized Tesson with the work.

Weyerich serves as the Employer's attorney and agent. Pratt reports to Weyerich. Weyerich, in turn, reports to Fernau. On Tesson's second or third day on the job, Weyerich spoke with her by telephone. He welcomed her to work.[6] Weyerich also asked Tesson whether the $5 wage rate was acceptable to her. Tesson agreed to it.

When Tesson was hired, the parties' collective-bargaining agreement specified that her job was included in the bargaining unit. At an unspecified time, shortly after Tesson began to work, Pratt told Goebel that Tesson's wage rate was $5 per hour. Goebel objected. He told Pratt that rate was lower than the contract wage. Pratt explained the job was complex and needed considerable training. Goebel withdrew his objection. At the hearing, Goebel explained this action was due to his concern that the Employer would seek to drop Tesson's classification

[2] The allegation of unlawful domination was disavowed by counsel for the General Counsel in his brief. Accordingly, I shall not deal with it in this Decision.

[3] The recitation of facts, and subsequent analysis, is derived from a composite of factual stipulations, unrefuted oral testimony, supporting documents, and other undisputed evidence. Not every bit of evidence, or every argument of counsel, is discussed. Nonetheless, I have considered all of them. Omitted matter is considered irrelevant or superfluous.

[4] Inasmuch as I shall conclude, *infra*, that Pratt is a statutory supervisor, he is named as part of the Employer's managerial hierarchy.

[5] Benefield resigned to accept employment as a legal secretary in the law firm with which Weyerich is associated.

[6] Weyerich testified, without contradiction, that he told Pratt to find a replacement for Benefield. Also, Weyerich credibly testified that he authorized Tesson's employment.

from the unit.[7] Goebel did not discuss the wage discrepancy with Tesson.

On October 9, 1979, Tesson became a union member. After that initiation, she was paid $7.18 per hour, according to the collective-bargaining agreement.

Sometime in October, Goebel met with all unit employees, eight in number including Pratt, to discuss their ideas for union proposals for a new collective-bargaining agreement. The existing contract was due to expire at midnight, November 14, 1979. Pratt and Tesson were among those present. Apparently, Goebel conducted the session. It was informal. Pratt's participation was limited to giving his opinion that it would be acceptable for the Union to propose to eliminate Tesson's two 15-minute breaks and expand her half hour lunch period to 1 hour. During the meeting, Tesson asked for this change.

Goebel was the Union's assistant business manager for 15 years. Goebel was unrefuted in his testimony that he is entirely responsible for administration of the Union's collective-bargaining agreements with the Employer. Additionally, Goebel credibly testified that he, together with a union steward, comprised the Union's negotiating team.

All witnesses who testified on the subject said that Pratt did not take part in any substantive collective-bargaining negotiations. The evidence shows that the November 1979 negotiations between the parties were conducted, on substantive issues, between Fernau and Weyerich for the Employer and Goebel and Simshauser for the Union.

Nonetheless, the Union's constitution, article XXIV, subdivision 1, section (b) and article VII, sections 1-15 of its bylaws, provide that Pratt, as an executive board member, has the right, *inter alia*, to participate in contract negotiations and grievances.

Pratt actually participated in grievance handling. He did so as a representative of the Employer. Thus, Simshauser credibly testified that in 8 years as steward he only presented one written grievance. An employee grieved that a fellow worker should have been paid overtime premium for Saturday work which was performed as a makeup day for one on which he had been absent the previous week. Simshauser presented a grievance to Pratt who resolved it by paying the overtime premium.

At this juncture, it is valuable to note that the collective-bargaining agreement which expired November 14, 1979, and its successor agreement with an expiration date of November 14, 1980, contain identical language entitled "Grievance Procedure," as follows:

> Should any dispute arise over the interpretation or application of this Agreement, same shall be adjusted by a meeting between representatives of the Company and the Union who shall have full authority to make disposition of the controversy.

Tesson worked continuously from her starting date into April 1980. On April 7, 1980, James Pratt (Pratt's son) was hired as a maintenance helper. Tesson learned of this when Pratt told her[8] that his son's wage rate would be the union scale. In fact, the 1979-80 contract, for the first time, includes the maintenance helper classification at a wage rate of $4.71 per hour.

Tesson took no immediate action. Instead, she waited until Pratt's son was initiated into the Union. This occurred on May 13. Then, Tesson told Kavanagh she had a grievance. She explained her grievance was over the Employer's failure to pay her the contract rate specified for her job classification from her initial date of employment. She observed James Pratt's wages were the same after his union initiation as before. Tesson told Kavanagh she believed this to be discriminatory.

Pratt apparently overheard Tesson's remarks. Pratt opined that the Union's executive board would probably reject her claim. Tesson retorted she would pursue the matter into arbitration.[9] Pratt responded that when Tesson lost the arbitration she would have to pay costs for herself and the Union.

Kavanagh became union steward by election conducted on May 14. Before that, Simshauser was steward. Tesson's announcement that she had a grievance was made immediately after the steward election occurred. General discussion ensued among the employees present as to the merits of the grievance. During that discussion, Kavanagh said he felt Tesson had a good grievance. A procedural discussion followed. Simshauser told Tesson that she would have to reduce her grievance to writing.

That same day, Kavanagh telephoned Goebel. They discussed Tesson's grievance and agreed it was meritorious. Goebel told Kavanagh to obtain a management response. Tesson had already written it out.

Kavanagh instructed Tesson to deliver a copy of the grievance to Pratt. Tesson placed the grievance on Pratt's desk.

Tesson testified that she waited until May 14 to file her grievance because she had no indication of apparent discrimination until she learned James Pratt's wages remained constant from his initial employment date through and after his union initiation. Tesson, however, acknowledged that she had read her wage rate of $7.18 in the contract at the time the employees met with Simshauser in October 1979 to give their views on contract proposals. She admitted not raising any question about the discrepancy between her actual pay and the contract rate with Goebel.

Later on the day that Tesson placed her grievance on Pratt's desk, she was required to take some dictation from him. In the midst of his dictation, Pratt commented that he believed the grievance was a "mistake." Pratt then instructed Tesson to forward the grievance to Weyerich. Pratt dictated a letter to Weyerich which read, "[A]ttached please find a copy of the grievance submitted by Mary Tesson. We'll discuss this later."[10]

[7] The secretary/bookkeeper classification was included in the bargaining unit for the first time after Benefield had been employed in that capacity.

[8] One of Tesson's functions was to maintain the payroll records.

[9] No arbitration provision is contained in either contract bearing expiration dates of November 14, 1979, or 1980.

[10] Pratt could not recall whether he actually dictated this letter. Because of her positive recall, I credit Tesson. Moreover, the evidence shows Weyerich later received the grievance.

After Weyerich received a copy of the grievance, he called Goebel and they discussed it. Weyerich maintained that Tesson was in training during her first 30 days of employment. Weyerich insisted there was no merit to the grievance. Goebel asked Weyerich to make his response in writing. Weyerich said he was not obligated to do so by the contract.

Goebel then contacted Jones. Jones told Goebel he thought the Employer might well be justified in its claim that Tesson's first 30 days were probationary.

Goebel then telephoned the Union's attorney, Levine. After hearing the facts, Levine expressed his belief that the grievance was untimely because of Tesson's delayed filing.

Goebel spoke again with Jones. He told Jones of Levine's opinion. Jones suggested that Goebel follow Levine's advice.

On May 20, Tesson and Goebel spoke by telephone. Goebel told her of Levine's position and said that the Union had decided the grievance had no merit as being untimely. Tesson pursued the issue. Thus, she asked Goebel if his comments meant the Union would not represent her. Goebel confirmed that understanding. They discussed the reason for her delay in filing. Tesson responded that James Pratt's situation first made her aware she might have a grievance. Tesson wanted to know who made the decision the grievance should go no further. Goebel said the decision was Jones'. Tesson asked whether the Union normally consulted its attorney at so early a time in the grievance process. Goebel claimed he contacted Levine because Weyerich was very upset about the grievance. Tesson asked if she could further pursue the matter. Goebel said she could appeal to the Union's executive board. Tesson questioned the efficacy of that procedure in view of the fact that Pratt, Jones, and Goebel were executive board members. Goebel responded Tesson had no other recourse.

Pratt, as the Employer's representative, discussed Tesson's grievance with her. Thus, on May 20, Pratt called Tesson into his office and told her that the Union had no jurisdiction over the first 30 days of work. Pratt told her, too, that she had a right to appeal the Union's decision not to go forward to its executive board. Tesson suggested this would be of no value because Pratt is a member of the executive board. He told Tesson he "probably will not vote." During this conversation, Pratt offered Tesson the opportunity to discuss her grievance with Weyerich and Fernau on May 22 when they were scheduled to be in Pratt's office. Pratt told Tesson she could ask for Goebel to be present at that meeting. He also said if she were to drop the grievance, the meeting would be unnecessary. Apparently, Tesson discarded the opportunity to meet with Pratt's superiors.

By letter dated May 20, 1980, Goebel wrote Tesson. He acknowledged receipt of her grievance. By that letter, the Union claimed the grievance had no merit "since . . . [it] . . . is not timely."

On May 21, Tesson wrote Jones. It is in this letter that Tesson advised of her intentions to appeal to the executive board. In that letter she requested Kavanagh attend on her behalf. By letter dated May 23, Jones responded. He advised a hearing had been set for her on June 24. Jones' letter also stated that Kavanagh would be advised of the meeting.

On June 24, Tesson and Kavanagh appeared at the executive board. Pratt excused himself. Goebel credibly testified that it was customary for executive board members to excuse themselves from consideration of any matter in which they might be personally involved. Tesson was told that Pratt would not participate.

Tesson was provided a full opportunity to explain her grievance. Kavanagh was given a chance to speak on her behalf. Kavanagh said he thought the grievance was meritorious. When the hearing ended, Tesson was told she would receive the executive board's response in writing.

After Tesson and Kavanagh left, the executive board deliberated her grievance. Goebel's uncontradicted testimony was that Pratt neither participated in the discussions nor executive board vote. Additionally, Goebel said he did not vote. The executive board decided not to grant Tesson's appeal.

On July 1, 1980, Jones wrote Tesson that the executive board considered her appeal and decided it should be denied because it "is without merit."

B. *Discussion and Analysis*

1. Pratt's supervisory status

Whether Pratt is a supervisor within the meaning of the Act is a threshold issue. Pratt's supervisory status is the predicate of the theories of violation propounded by the General Counsel.

Some of Pratt's activity on behalf of the Employer appears hereinabove. He interviews applicants for employment. He interviewed Tesson. Thereafter, he told her she was hired and arranged her reporting date. Additionally, Pratt has interviewed applicants for other unit positions, and made recommendations for hire to Weyerich. With rare exception, the record shows, Weyerich has concurred in Pratt's recommendations.

Pratt entertained and adjusted an employee grievance. Thus, Simshauser's testimony that he discussed, and resolved, an overtime pay grievance with Pratt is unrefuted.[11]

Also, it is undenied that Pratt discussed the substance of Tesson's grievance with her. During that conversation, Pratt offered Tesson the chance to directly address Weyerich and Fernau on that issue. In this context, I conclude that Pratt acted on behalf of the Employer.

In addition, the record contains the following evidence pertaining to the supervisory issue:

> (a) Pratt's title and wages. Pratt's job is classified as Supervisory Stationary Engineer in the collective-bargaining agreements. Pratt identified himself as Civil Engineer and Building Manager. He issues correspondence for the Employer under the title of Building Manager. Although one's title, alone, is

[11] In this posture, I place little significance on Weyerich's claim that he did not know Pratt functioned in this manner. It is undeniable that the Employer placed Pratt in a position where his actions are imputable to it.

not dispositive of the supervisory issue,[12] it is some evidence he acts in the Employer's behalf.

Pratt receives an annual salary as Supervisory Engineer. Also, he is paid $150 per week as a management fee for his duties as Building Manager. In contrast, the other employees are paid an hourly wage, plus overtime when applicable.

(b) Pratt's authority. He is directly responsible for the activities of all other employees working at the particular facility where he is stationed. Thus, in addition to Tesson, there are two stationary engineers, two maintenance mechanics and two maintenance helpers. They all report to Pratt. He is the sole management official present at that facility.

He is responsible for the work assignments of all employees. Though the employees perform their work without Pratt at their side constantly, he makes daily work assignments, sometimes assisted by Tesson, to those employees. Pratt establishes work priorities and inspects employees' work.

Pratt grants time off, assigns overtime and handles work-related problems of the employees. Those problems which he cannot resolve are referred by him to Weyerich.

Tenant requests for major maintenance work, such as painting and erection of partitions, are referred to Pratt. Major requests of this nature are referred by him to Weyerich.

Pratt signs contracts, on the Employer's behalf, with its material suppliers, although Weyerich reviews those contracts.

(c) Pratt's working conditions differ from most employees. He has an office and is provided a personal secretary, currently Tesson. He wears slacks and a sport coat at work, while the other employees (except, of course, Tesson) wear uniforms or overalls. Pratt regularly performs no manual work.

Pratt receives fringe benefits, such as sick leave, vacations and pension, similar to the other employees. However, he receives the use of a company automobile and a daily newspaper.

(d) Pratt confers regularly with undisputed members of the Employer's managerial hierarchy. He meets with Weyerich at least once a week. They speak more often by telephone. Pratt also meets with Fernau on occasions of Fernau's visits to the subject facility. However, Pratt does not participate in the formulation of the Employer's labor relations policies.

Various criteria exist by which the Board determines supervisory status. It is not necessary that an individual possess all the indicia identified in Section 2(11) of the Act. The statute is disjunctive. Possession of *any* indication of supervisory authority makes one a supervisor. *N.L.R.B.* v. *Metropolitan Life Insurance Company*, 405 F.2d 1169 (2d Cir. 1968); *Great Central Insurance Company*, 176 NLRB 474, 475 (1969).

I conclude that the record amply demonstrates that Pratt effectively manages the day-to-day operations at the Employer's subject facility located at 300 South Grand Boulevard, St. Louis, Missouri. To conclude otherwise is unrealistic and illogical. A contrary finding would subject the facility to operating without on-the-spot supervision. This factor is appropriately considered in the determination of a supervisory issue. See *National Association for the Advancement of Colored People*, 241 NLRB 430 (1979).

Section 2(11) of the Act defines supervisor:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Clearly, Pratt possesses and exercises numerous indicia of supervisory authority. The record shows he hires or, at least, effectively recommends the hiring of employees. He adjusted an overtime grievance. He assigns work. These activities, in addition to the others stated above, are sufficient to satisfy the General Counsel's contentions. Accordingly, I find Pratt a supervisor at all material times.[13]

The Employer sought to minimize Pratt's functions and authority. Thus, the Employer adduced evidence to show that Pratt functioned pursuant to persistent and frequent direction from Weyerich. I agree there is some evidence supporting the Employer's position. However, on balance, I find that Pratt's actual exercise of a variety of functions demonstrates that he must, and does, use his independent judgment in the performance of such activities (e.g., determining work priorities and assignment of overtime). Moreover, Pratt adjusted the overtime grievance apparently on his own. Thus I conclude that the record shows Pratt responsibly directs the activities of employees. Such responsible direction supports a conclusion that Pratt is a supervisor. *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972).

2. Pratt's role in the Union

The complaint allegations require examination of the extent to which Pratt plays a role in union affairs. The General Counsel's theories of violation as to the Employer in effect question the propriety of Pratt serving in the dual capacity of an employer's supervisor and a union official.

As previously observed, Pratt is the union president and executive board member. He has been a member of the executive board for 17 years. The executive board is the Union's policymaking organ.

As reported, hereinabove, the Union's constitution provides that executive board members may participate in collective-bargaining negotiations. Additionally, they may consider grievance appeals made to that body. Also,

[12] *Golden West Broadcasters-KPLA*, 215 NLRB 760, 762, fn. 4 (1974).

[13] I shall comment on the General Counsel's contention that Pratt is a "high level" supervisor, *infra*.

the Union's constitution provides that any bylaws empower its president to preside at executive board and regular meetings, to summon members before the executive board, to be custodian of the Union's records and properties, and to sign labor agreements.

There is no probative evidence to show Pratt participated in collective-bargaining negotiations involving the instant Employer. He did not participate in any discussions concerning substantive matters between the Employer and union bargaining teams. I have noted that Pratt attended the October meeting Goebel held with employees to formulate the Union's proposals. At that meeting, Goebel asked for Pratt's view on the feasibility of Tesson's proposal to expand her lunch hour in lieu of her two work breaks. Pratt said he could work with that arrangement. I disagree with the General Counsel that this expression of opinion rises to the status of participation in collective-bargaining negotiations. The session was not held for employer-union bargaining. The question was posed to Pratt obviously because of the fortuitous circumstance that he was, as Tesson's supervisor, in the best position to evaluate the efficacy of Tesson's request. Moreover, there is no evidence to show Goebel accepted Pratt's statement of opinion as the equivalent of an agreement between the Union and the Employer.

In all other respects, the record shows Pratt actually exercised his official union authority *vis-a-vis* the instant Employer only by having signed the collective-bargaining agreement. Moreover, in connection with Tesson's grievance, his activity was conducted only as a management representative. When the grievance reached the executive board level, he completely abstained from functioning in any union capacity.

Pratt did exercise his rights of union membership. Thus, he attended Goebel's October proposal-suggestion meeting, voted on ratification of the collective-bargaining agreement, and apparently participated in the May 14, 1980, election at which Kavanagh was elected steward.

3. Analysis—Case 14-CA-13933

Citing *Nassau and Suffolk Contractors' Association, Inc.*, 118 NLRB 174 (1967), and its progeny, the General Counsel contends that Pratt is a high-level supervisor and that his participation in intraunion affairs as president and executive board member establishes that the Employer unlawfully interfered with the administration of the Union.

The Board has consistently held it to be a violation of Section 8(a)(2) and (1) of the Act where high-level supervisors hold the dual positions, as herein, even where the evidence shows that the subject individual engages in merely routine intraunion activities and no actual conflict arising from the dual functions is shown. *Schwenk Incorporated*, 229 NLRB 640 (1977); *Western Exterminator Company*, 223 NLRB 1270 (1976), modified 565 F.2d 1114 (9th Cir. 1977).

In *The Western Union Telegraph Company* , 242 NLRB 825 (1979), I reviewed the applicable precedent. In salient part, I concluded that, if it is proved that an actual conflict of interest exists between an individual's supervisory position and his capacity as union official, an 8(a)(2) and (1) violation would occur regardless of the individual's supervisory level in his employer's hierarchy. *Western Union, supra* at 829.

Apparently, this conclusion has been confirmed. Thus, in *Narragansett Restaurant Corp.*, 243 NLRB 125 (1979), the Board left undisturbed Administrative Law Judge Irwin Kaplan's 8(a)(2) finding based on his conclusion that the evidence showed an actual conflict existed in a situation involving a low-level supervisor.

Determination of the instant issue is made on a case-by-case basis. The Board has rejected a *per se* approach. *Anchorage Businessmen's Association, Drug Store Unit, et al.*, 124 NLRB 662 (1959). Applying an *ad hoc* approach, I conclude the evidence herein demonstrates an actual conflict existed in Pratt's possession of the dual positions.[14]

Most persuasive is the evidence of Pratt's activities in the grievance procedure. As already observed, Pratt discussed the Saturday overtime grievance with Simshauser, and resolved it. Also, Pratt spoke to Tesson about her grievance and invited her to further discuss it with Weyerich and Fernau.

The contractual grievance language, cited hereinabove, reflects it is quite informal. No detailed steps are set forth. For analysis purposes, I characterize the grievance language in the contract as the *de jure* procedure. In practice, however, the parties developed a procedure which may be termed *de facto*. Thus, it is apparent that the parties actually established at least a two-step procedure.

The first step of the *de facto* procedure involved discussion of the grievance between a union steward and the first level of supervision. Thus, the overtime grievance was initially discussed by Steward Simshauser with Pratt, the immediate supervisor. At that stage, the grievance was resolved. Similarly, Tesson's grievance was first brought to Pratt, her immediate supervisor, by Steward Kavanagh after Tesson reduced the grievance to writing. Tesson's grievance form bears Pratt's name on the line designated "foreman," and Kavanagh's as "steward." Use of the grievance form in this manner supports the General Counsel's claim that Pratt participated in grievance handling. Moreover, Pratt orally told Kavanagh the grievance was denied.

The second *de facto* step was then taken. Pratt forwarded Tesson's grievance to Weyerich, who discussed it with Goebel, Kavanagh's superior in the Union. The operation of the *de facto* procedure underscores my conclusion that Pratt directly participated in grievance handling.

Even if there is disagreement with the validity of the *de jure/de facto* distinction I have made, such disagreement does not alter my conclusion that the evidence otherwise shows Pratt's active participation in grievance handling. Such participation has been held to create an actual conflict regarding the dual roles possessed by Pratt.

[14] In view of this finding, and for the sake of brevity, I find it unnecessary to pass upon the General Counsel's principal theory which is founded upon Pratt as a high-level supervisor.

In *Abilene Area Sheet Metal Contractors Association and Abilene Sheet Metal, Inc.*, 236 NLRB 1652 (1978), a supervisor engaged in many of the supervisory activities performed by Pratt. He also processed the grievances. In *Narragansett Restaurant, supra*, the finding that a conflict existed by virtue of dual functions was based, in part, on a supervisor's authority to process grievances.

My assessment of whether there exists a conflict is based on yet another consideration; namely, Pratt's relationship to the union stewards. Thus, the record shows Pratt was the immediate supervisor of Stewards Simshauser and Kavanagh. This relationship establishes an inherent danger. The actions of union stewards in such a context readily are susceptible to pressures which effectively diminish the integrity of the grievance procedure.

Analysis of the *Nassau and Suffolk* line of cases shows that they are factually distinguishable from the case at bar. Those applicable to the instant situation hold, generally, that unlawful interference in the affairs of a union occurs when dual-function supervisors engage in collective bargaining (in a broad sense) *with their employers*. Herein, there is no evidence that Pratt engaged in such collective bargaining with the instant Employer. In all regards shown on this record, Pratt functioned *on behalf of the Employer*, not the Union. Nevertheless, I find the distinction of little significance.

No case has been cited, nor has my research uncovered any case, which holds that the mere possession of the dual positions of supervisor and union official constitutes unlawful assistance violative of Section 8(a)(2) and (1).

It is instructive to examine the rationale underlying those cases which proscribe dual activity. In *International Association of Machinists; Tool and Die Makers Lodge No. 35, etc. [Serrick Corporation]* v. *N.L.R.B.*, 311 U.S. 72, 80 (1940), the Supreme Court declared that functioning in the dual capacities results in divided loyalties and would be contrary to the clear legislative policy to free the collective-bargaining process from *all* taint of employer influence.

In *Nassau and Suffolk*, 118 NLRB at 187, the Board stated, in part:

> *Employees have the right to be represented in collective-bargaining . . . by individuals who have single-minded loyalty to their interests,* . . . an employer is under a duty to refrain from any action which will interfere with that . . . right and place him even in *slight degree* on both sides of the bargaining table. [Emphasis supplied.]

The above-cited precedent mandates that an individual clothed in the dual competing roles be utterly free from the suggestion of impurity. Thus, the instant case turns on whether the facts show that the possession of the double identity adversely affects the Union's performance as an effective employee representative.

The totality of circumstances herein convinces me that, by permitting Pratt to handle grievances, the Employer has interfered with the administration of the Union because such activity impedes effective administration of the Union's collective-bargaining obligations (herein, the processing of grievances). Moreover, I conclude that the employees represented by the Union are prevented from receiving the unfettered and undivided fealty which the courts, the legislature, and the Board declare is their right.

In other contexts, the Board has recognized the existence of institutional pressures upon supervisor-union members. See *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB 2173, 2174 (1968). Herein, Pratt is more than a rank-and-file member of the Union. He holds the highest office and is also a member of the Union's executive board. The institutional pressure he surely brings with him by virtue of his supervisory position is obvious. As a supervisor, Pratt is obliged to promote his employer's best interests. Those interests are in regular competition with those of the Union and its members.

Goebel's initial reaction to Pratt's explanations when they first discussed Tesson's wage rate is significant. As noted, Goebel acquiesced. He explained he did so because he became concerned over the possibility the secretary/bookkeeper classification would be removed from the bargaining unit.

I cannot accept Goebel's explanation for his forbearance. It is internally inconsistent. It defies industrial realities. One of the ways to keep the secretary/bookkeeper classification within the bargaining unit would be to file a grievance over Tesson's wage discrepancy. Instead, Goebel did nothing. He did not even discuss the situation with Tesson. Thus, his inaction signals Goebel's true motivation was based on some factor other than his concern over the possibility the job might be removed from the bargaining unit. Such fear, if it existed, was pure speculation. Though negotiations for a new agreement were forthcoming, the Employer had not made any proposal to that effect. Nowhere in his conversation regarding Tesson, with Goebel, did Pratt say the Employer had been considering such a proposal. Thus, in the entire backdrop, it is reasonable to conclude Goebel had been influenced by Pratt's position as union president, though Pratt was speaking on the Employer's behalf. This situation presents a classic example of institutional pressure which adversely affects the ability of the Union to fulfill its representational obligations to its constituents. See *IAM, Lodge No. 35* v. *N.L.R.B., supra*. To say the actions of the Union's officials have not been, or may not be, colored by Pratt's influence is unrealistic. He was strategically so placed that he clearly could transmit the Employer's desires to his fellow union officials, albeit in the most subtle of terms. Viewed in this light, Pratt's supervisory authority cannot help but have an effect upon the conduct of the Union's business and obligations. In sum, I conclude Pratt's power permeates, and has a detrimental effect upon, effective unencumbered administration of the Union.

Upon the foregoing proven participation by Pratt in grievance handling and the analysis, I find his dual positions as supervisor and union official create an actual conflict of interest. It is immaterial whether Pratt is a high- or low-level supervisor. Upon the applicable au-

thority cited hereinabove, I find that the Employer has violated Section 8(a)(2) and (1) of the Act, as alleged. See *ITT Arctic Services, Inc.*, 238 NLRB 116 (1978); *E.E.E. Co., Inc.*, 171 NLRB 982 (1968), for analogous situations.

4. Analysis—Case 14-CB-4985

The General Counsel contends that the Union breached its duty of fair representation in violation of Section 8(b)(1)(A). Specifically, he asserts that the manner in which Tesson's grievance was handled by the Union was repugnant to its fiduciary duty. Thus, it is claimed the Union's actions did not comport with the required standard of good faith and fairness in processing grievances established by the precedent of *Vaca, et al.* v. *Sipes*, 386 U.S. 171 (1967); *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962). The duty of fair representation which emanates from those cases requires a union serve the interests of all the employees they represent fairly and in good faith, and without hostile discrimination against any of them on the basis of unfair, arbitrary, irrelevant, or invidious distinctions. Mere negligence or poor judgment is insufficient to establish a breach of such duty. The Act does not guarantee the quality of representation. Effective administration of contractual grievance machinery requires that a union be afforded a broad range of discretion in deciding what grievances to pursue, and the manner in which they should be handled. *Vaca* v. *Sipes, supra* at 191–192; *Ford Motor Co.* v. *Huffman et al.*, 345 U.S. 330, 338 (1953); *Truck Drivers, Oil Drivers and Filling Station and Platform Workers Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Transport, Inc.)*, 209 NLRB 292 (1974).

The Union argues the evidence discloses it made a good-faith attempt to process and resolve Tesson's grievance. Further, the Union claims it acted expeditiously in attempting to resolve the dispute in Tesson's favor. Also, by implication, there is a suggestion that Goebel made a sound business judgment not to pursue Tesson's wage rate problem in October when he first discovered it existed.

The General Counsel virtually concedes that the evidence shows the Union did present Tesson's grievance and did entertain her appeal to the executive board. As reported above, the facts show that Pratt functioned only as part of management concerning Tesson's grievance. Particularly, he removed himself and abstained from all activities as a union official in connection with the grievance. Thus, I conclude he scrupulously tried to maintain an aura of fairness.

Notwithstanding the comments contained in the immediately preceding paragraph, I find the Union's defenses only superficially appealing. Ostensibly, the Union did all it could to process Tesson's grievance. Acknowledging this, the General Counsel contends such processing was a sham. I agree. A complete analysis shows the defense does not withstand scrutiny.

As noted, Goebel testified that he spoke with Pratt regarding Tesson's wages as soon as he learned she had not received the contract rate. Pratt claimed Tesson's first 30 days needed to be probationary. The reason given was the complexity and confidential nature of her work. At that point, Goebel backed off. He did not further press the matter at the time. I have already reviewed the spurious character of Goebel's reaction. I find his inaction unjustified. Nonetheless, Goebel said nothing about the matter to Tesson.

Goebel testified that, in essence, the bargaining history supported the Employer's position. The record shows Benefield received less than the contract rate until after she joined the Union.

Reliance on this bargaining history is misplaced. The secretary/bookkeeper classification was not included in the bargaining unit until the November 1976 contract. Thus, in reality, Benefield's rate change to the contract wage was due to that inclusion rather than to her ending a period of probation.

Likewise, it is erroneous for the Union to rely on the arguable merits of the Employer's claimed need for a period of training. For the Union to have accepted that position, as it did, is tantamount to an oral midterm modification in the terms of the negotiated written collective-bargaining agreement. In fact, there is no evidence that either party requested negotiations on the subject of a probationary period.

In this context, the Union and, as noted, Goebel in particular, remained silent. Though he knew the contract wage was not being paid, he did not apprise Tesson of the situation. The right of any employee to file a grievance is jealously guarded. Indeed, Section 9(a) of the Act provides a right to individual employees to present grievances to their employer and have them adjusted without the intervention of their bargaining representative as long as the adjustment is not inconsistent with the terms of a collective-bargaining agreement then in effect. A union may not purposely keep employees uninformed or misinformed concerning their grievances. *Groves-Granite, a Joint Venture*, 229 NLRB 56, 63 (1977), and cases cited at fn. 33. In the instant case, there can be no doubt that Goebel consciously neglected to apprise Tesson of his conversation with Pratt concerning her wage rate and his conclusions based on that discussion.

The Board, in *Local 417, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Falcon Industries, Inc.)*, 245 NLRB 527 (1979), found a union violated Section 8(a)(1)(A) by concealing from a grievant the fact that it was not processing her grievance. This action constituted a breach of the union's fiduciary duty. Herein, I conclude that Goebel had the obligation, at least, to advise Tesson of all the facts at his disposal. This is especially true where, as here, Goebel had reversed his own belief that the grievance had merit. This would have afforded her an opportunity to decide on a course of action. In this regard, I am mindful of the fact Tesson actually first learned of her wage disparity when she read the contractual wage provisions around the time of Goebel's October employee meeting to discuss possible proposals. Tesson admitted she did not raise a question about her wages at that time. I place little significance on this omission. If a fiduciary relationship has meaning it must be to require the more experienced and knowledgeable

party to that relationship to inform the less experienced and less educated party of all available relevant facts and afford advice based on them. Clearly, Goebel was vastly more experienced and knowledgeable in labor-management relationships than Tesson. Moreover, Goebel personally was a participant in the background events leading to Tesson's grievance. In contrast, the record shows Tesson was comparatively naive in these matters.

The vice attending Goebel's neglect is demonstrated by later events. As noted, the Union's executive board denied Tesson's appeal on the ground it was untimely. Indeed, approximately 8 months elapsed between Tesson's initial employment and the date she filed her grievance. During that time, the specific collective-bargaining agreement, which contained the wages named in the grievance, had expired. In part, the Union's defense to the complaint allegations is to the same effect. There can be no merit to such a defense. In effect, the defense would provide shelter to the Union for its own earlier neglect. This result makes manifest the unfair character of the Union's handling of Tesson's grievance.

Upon all the foregoing, I conclude that the General Counsel has established that Tesson's grievance is not clearly frivolous, and the historical backdrop belies the Union's contention that its judgment not to proceed was sound. That neglect set the stage for ultimate executive board denial of Tesson's appeal. In these circumstances, it is inescapable that the processing of Tesson's grievance which the Union undertook in May and June 1980 was nothing more than perfunctory.

Upon all the foregoing, I find the Union breached its duty of fair representation, in violation of Section 8(b)(1)(A) of the Act, by (1) withholding, without valid reason, the information from Tesson that she might have grounds to file a grievance[15] and (2) by denying Tesson's appeal to the executive board because the decision of that board flowed directly from the failure, which I find arbitrary, to have advised Tesson of her rights in timely fashion. The latter action constitutes a refusal to process the grievance.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW[16]

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer interfered with the administration of the Union in violation of Section 8(a)(2) and (1) of the Act by permitting its supervisor, Carl B. Pratt, to handle grievances of members of a labor organization in which Pratt held the position of president and executive board member simultaneous with his supervisory position.

4. The Union breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act by withholding from Tesson information concerning her wage rate discrepancy in October 1979, and by refusing to process her May 14, 1980, wage grievance when it, by letter dated July 1, 1980, denied her appeal to its executive board.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Employer and the Union violated Sections 8(a)(2) and (1) and 8(b)(1)(A) of the Act, respectively, I shall recommend that they cease and desist from engaging in such conduct in the future and affirmatively take such action as will dissipate the effects of their unfair labor practices.

The Order will require both the Employer and the Union, jointly and severally, to reimburse Tesson. Such reimbursement orders were issued by the Board in *Western Exterminator, supra*, and *Welsbach Electric Corporation*, 236 NLRB 503 (1978). The General Counsel has requested the reimbursement remedy based on these cases. Conceivably, each of these cases is distinguishable from the instant case in that the cited cases contained elements of discriminatory conduct perpetrated by the respondents. Such elements are not present herein.

Nonetheless, because of the amorphous character of the instant grievance procedure and the other factors about to be described, I am impelled to agree that reimbursement is an appropriate remedy. In the face of the contract grievance language, to order the parties to process the grievance has doubtful value. Even though I have found there exists a *de facto* procedure, there is no evidence of grievance phases which would allow the parties to continue their efforts to process Tesson's grievance. There is no contractual provision for arbitration.

Next, referral to the parties only defers resolution of the issues. In the peculiar circumstances herein, I can find no justification for further delay. The relevant collective-bargaining agreement contains an unqualified wage rate for Tesson's classification. She was paid less than that rate. I have found the Union's failure to provide Tesson with the facts surrounding her wages was baseless and its refusal to process the grievance unlawful; the grievance procedure is tainted and inherently coercive because of Pratt's dual positions, and the Union's failure to fully process the grievance directly attributable to its earlier misdeeds. Thus, in spite of the potential for criticism grounded on a claim that this is not the proper forum for determining the merits of grievances, I perceive a reimbursement remedy to be the natural consequence of the mutual participation of the Employer and the Union in, and continuation of, the grievance procedure which is tainted with illegality.

In essence, the failure to process the grievance, the tainted nature of the grievance procedures, and the absence of additional procedures by which the grievance might now be resolved all combine to create an uncer-

[15] The duty to avoid arbitrary conduct "must mean at least that there be a reason for action taken." *General Truck Drivers, Warehousemen, Helpers and Automotive Employees, Local 315 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Rhodes & Jamieson, Ltd.)*, 217 NLRB 616 (1975). I have found the proffered reason without substance.

[16] At the hearing, I deferred ruling upon the Employer's and the Union's motions to dismiss the complaint allegations against each. Based on the conclusions of law set forth herein, each such motion is hereby denied.

tainty as to the merits of Tesson's grievance. In such circumstances, it is appropriate that the uncertainty be resolved against the wrongdoer. *King Soopers, Inc.*, 222 NLRB 1011 (1976). *Service Employees International Union, Local No. 579, AFL-CIO (Convacare of Decatur d/b/a Beverly Manor Convalescent Center, et al.)*, 229 NLRB 692 (1977).

The reimbursement order herein shall require payment of the difference between the contractual wage rate in effect during Tesson's first 30 days of employment in her job classification and the hourly rate which she actually received during that time. Interest, computed in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977), shall be paid on such reimbursement.

Inasmuch as no evidence was presented to show that the Employer or the Union has a proclivity to violate the Act, under the teaching of *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), I conclude the Order need not contain broad proscriptive language. Accordingly, the Order shall require the Employer to refrain from in any like or related manner interfering with, restraining, and coercing its employees, and the Union from in any like or related manner restraining or coercing employees in the exercise of their Section 7 rights.

[Recommended Order omitted from publication.]